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Making moral judgments through behavioural science: the 'substantial lack of volitional control' requirement in civil commitments

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In several recent cases, the United States Supreme Court has held that so-called sexually violent predators can be civilly committed if the state demonstrates that they are *mentally abnormal* and *dangerous*. The first criterion is legislatively defined but must include 'proof of serious difficulty in controlling behaviour' The second criterion has yet to be defined by the Court with any statistical precision, but presumably requires some substantial likelihood of future violence. This essay argues that the first criterion, that the offender lack volitional control, effectively invites fact finders to consider moral blameworthiness for conduct that has yet to occur. This is so because there is no scientific basis for determining when an act is a function of 'free will'. Free will is a normative conclusion that has no corresponding operational definition that can be tested. Because the first criterion is empirically without content, this leaves only the second criterion of dangerousness. Yet the Supreme Court has yet to consider just how likely future violence must be before a person can be committed. State courts have disagreed on this subject. In all likelihood, the Supreme Court will have to revisit this subject and determine what level of future 'dangerousness' should qualify a person for indefinite detention.

Keywords: free will; predictions of violence; dangerousness; risk assessment; sexually violent predators

1. Introduction

Many religious beliefs rest improbably on empirical supposition. This is the reason that the Catholic Church felt so threatened by Jupiter's moons, first observed through Galileo's telescope, and modern creationists fear Darwin and DNA. Sectarian empirical suppositions do not usually dictate moral precepts themselves, but they tend to provide the framework to which moral precepts are affixed. Thus, when Copernicus wrenched the earth from its vaunted spot at the centre of the universe, man's privileged place fell along with it. Religious principle thus seems to require a theory of the empirical world in which it is to be situated. Much the same is true for secular law. And, just as is true for religion, if those factual premises crumble, the moral objectives attached to that edifice fall along with it.

Law's creation myth is that man has free will. This premise guides legal jurisprudence both philosophically and practically. At some level or another, moral responsibility requires freedom of action. If a person could not have acted any other way than he did, how can he be held responsible, and punished, for having so acted? The philosophical puzzles generated by the connection between man's mind and his actions have occupied

philosophers since at least the time of Aristotle. This short essay makes no pretence of settling any of the outstanding issues regarding the existence, or lack thereof, of free will. Nor does it say much about the law's beginning premise that man chooses whether to act or not and thus is responsible for the consequences of his actions. This essay considers how the belief in free will—as an empirical proposition—affects one small corner of the law, the law of the civil commitment of sexually violent offenders. Indeed, in this area, it is the search for those who lack volitional control that throws into stark relief the consequences of believing that free will is an empirical fact rather than a normative judgment.

As a practical matter, free will in the law is synonymous with moral responsibility. A person whom we believe should take responsibility for his actions we believe could have acted otherwise. Certainly, most jurors do not count the angels on a head of a pin in the process of parcelling out punishment. When jurors consider whether a defendant is responsible for the harm he caused, it is reasonable for them to use notions such as free will loosely. This is true even if the concept has no specific factual basis or it is impossible to discern when an action is 'free' or is 'determined' When jurors decide to hold someone responsible for his behaviour, to believe he could have acted otherwise, they are exercising a normative judgment, not making a finding of fact. There is no such 'fact' to be found. Scientists generally do not speak in such terms—at least not professionally—and they have yet to operationally define the concept. Scientists are determinists, at least in their research agendas, and their task is to identify what factors affect behaviour, whether they be found in nature or nurture. Free will, if such exists, is, at best, a component of their error terms or simply a subject for philosophers and lawyers.

Free will is nothing more than a jury's normative judgment that, under the circumstances known to them, a criminal defendant should, or should not, take responsibility for his actions. Moreover, free will as moral responsibility also serves the general purposes of the criminal law. The Supreme Court has identified retribution and deterrence as the twin objectives of the criminal law. Criminal punishment serves these purposes if a person is responsible for his behaviour. But again, free will has no factual referent in this context. Deterrence alerts actors to what might occur if they transgress and retribution imposes consequences for what somebody has done. It is logically sound, therefore, to employ free will normatively in the criminal context to mete out punishment for behaviour that jurors determine that defendants should be held responsible for.

In the context of civil commitments, however, the place for free will and moral responsibility is considerably less clear. Given the indeterminate empirical nature of free will—i.e., it is a normative concept signifying moral responsibility—depriving someone of his liberty for something he is expected to do in the future is more difficult to justify. If a person really has 'free will,' then he may yet choose not to commit the act for which he is being civilly committed. We can hardly say that he is responsible for that conduct since it has not yet occurred. Thus, the moral component of free will cannot be used to incarcerate someone for future acts and the only component remaining is the empirical component. But, as I have said and will return to, there is no empirical component. Free will has no factual referent. Free will is a legal fiction. If free will cannot be empirically determined, and is always operating as a proxy for assessing moral responsibility, then its use in civil commitments effectively transforms civil commitment hearings into criminal proceedings. It is my thesis that this is exactly what is happening under the Supreme

Court's jurisprudence in the area of civil commitments of so-called sexually violent predators.

2. 'Sexually violent predators'

A. Lack of volitional control

Over the past several years, the subject of sexual aggressors has garnered extraordinary attention from the courts. Between 1997 and 2003, the Supreme Court decided a spate of cases involving various issues arising around society's response to sex offenders.[1] In addition, numerous state court decisions have considered a surfeit of issues surrounding sexual aggressors. Communities across the nation have identified sexual aggressors as a key problem needing redress. Accordingly, legislatures have fashioned an assortment of measures intended to control and incapacitate this population. These measures, however, suffer from a good deal of ambiguity, and have repeatedly brushed against the boundaries of constitutional safeguards. The courts have been left to sort through these measures, say what they mean and how they ought to be implemented, and establish the constitutional outer limits of their operation.

In 1997, in *Kansas v. Hendricks*,[2] the Court upheld the Kansas sexual predator law which provided for the commitment of a person who (1) has committed a sexual offence sometime in the past, (2) is mentally abnormal (or defective, disordered, etc), and (3) is likely to commit a sexual offence in the future.[3] Two principal questions were raised but not answered in *Hendricks*. The first concerned the issue of how likely the future violence had to be in order to qualify a past sexual offender as a sexual 'predator'.[4] The Court has yet to answer this specific question, but many lower courts have offered a variety of responses to it. The second concerned how lower courts should operationally define 'mental abnormality'. In 2002, in *Kansas v. Crane*,[5] the Court addressed this second question.

The Kansas statute defined mental abnormality as '[a] congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to commit sexually violent offenses in a degree constituting such person a menace to the health and safety of others'.[6] In *Hendricks*, the Court stated, the statute's 'requirement of a 'mental abnormality' or 'personality defect' is consistent with the requirements of . . . other statutes that we have upheld in that it narrows the class of persons eligible for confinement to

[1] Two of the cases involved civil commitment, *see Kansas v. Hendricks*, 521 U.S. 346 (1997) and *Kansas v Crane*, 534 U.S. 856 (2002); two involved community notification statutes, *see Smith v. Doe*, 123 S.Ct. 1140 (2003) and *Connecticut Dept. of Public Safety v. Doe*, 123 S.Ct. 1160 (2003); one involved conditions of incarceration, *see Seling v. Young*, 534 U.S. 407 (2002); and the most recent involved a state law enacted to permit prosecution of sex-related offenses but passed after expiration of the previously applicable limitations period, *see Stogner v. California*, 123 S.Ct. 2446 (2003).

[2] 521 U.S. 346 (1997).

[3] KAN. STAT. ANN. §59-29a02(b).

[4] Although the Supreme Court has yet to consider the question of how 'likely' the likely violence must be, state courts' treatment of this issue is discussed *infra* §2B.

[5] 534 U.S. 407 (2002).

[6] KAN. STAT. ANN. §59-29a02(b) (1994).

those who are unable to control their dangerousness' [7] In *Crane*, the Court considered the question, how much 'lack of control' is necessary to meet the constitutional minimum.

The State of Kansas argued that 'the Constitution permits commitment of the type of dangerous sexual offender considered in *Hendricks* without *any* lack of control determination'.[8] The Supreme Court disagreed. But the Court did say 'that *Hendricks* set forth no requirement of total or complete lack of control' [9] Indeed, the Court observed, 'an absolutist approach is unworkable' Such a requirement, the Court explained, 'would risk barring the civil commitment of highly dangerous persons suffering severe mental abnormalities' [10] Still, the Court said, not requiring any lack of control would undermine 'the constitutional importance of distinguishing a dangerous sexual offender subject to civil commitment 'from other dangerous persons who are perhaps more properly dealt with exclusively through criminal proceedings' '.[11] If a person can control his behaviour, then civil commitment potentially becomes a ' 'mechanism for retribution or general deterrence'—functions properly those of criminal law, not civil commitment' [12] Therefore, the constitutional mandate for proof of lack of control lay somewhere between complete control and complete lack of control over one's actions.

The Court, however, was reluctant to define with any 'mathematical precision' the meaning of lack of control. The Court stated that '[i]t is enough to say that there must be proof of serious difficulty in controlling behavior'.[13] The Court lamented its inability to be more precise. 'But,' it explained, 'the Constitution's safeguards of human liberty in the area of mental illness and the law are not always best enforced through brightline rules' [14] The Court added that it has 'sought to provide constitutional guidance in this area by proceeding deliberately and contextually, elaborating generally stated constitutional standards and objectives as specific circumstances require' [15]

Justice Scalia's dissent, joined by Justice Thomas (the author of *Hendricks*), was particularly contemptuous of the majority's failure to establish a more definite standard: 'This formulation of the new requirement certainly displays an elegant subtlety of mind. Unfortunately, it gives trial courts, in future cases under the many commitment statutes similar to Kansas' SVPA, *not a clue* as to how they are supposed to charge the jury!'[16]

[7] *Hendricks*, 521 U.S. at 358.

[8] *Crane*, 122 S.Ct. at 870 (emphasis in original).

[9] *Id.*

[10] *Id.*

[11] *Id.* (*quoting Hendricks*, 521 U.S. 360).

[12] *Id.* (*quoting Hendricks*, 521 U.S. at 372–73) (Kennedy, J., concurring).

[13] *Id.*

[14] *Id.* at 871.

[15] *Id.*

[16] *Id.* at 876 (Scalia, J., dissenting) (emphasis in original). Justice Scalia added the following for emphasis:

> I suspect that the reason the Court avoids any elaboration is that elaboration which passes the laugh test is impossible. How *is* one to frame for a jury the degree of 'inability to control' which, in the particular case, 'the nature of the psychiatric diagnosis, and the severity of the mental abnormality' require? Will it be a percentage ('Ladies and gentleman of the jury, you may commit Mr. Crane under the SVPA only if you find, beyond a reasonable doubt, that he is 42% unable to control his penchant for sexual violence')? Or a frequency ratio ('Ladies and gentlemen of the jury, you may commit Mr. Crane under the SVPA only if you find, beyond a reasonable doubt, that he is unable to control his penchant for sexual violence 3 times out of 10)? Or merely an adverb ('Ladies and gentlemen of the jury, you may commit Mr. Crane under the SVPA only if

Justice Scalia argued that the appropriate standard is singular, albeit with two elements. The Kansas statute, Scalia pointed out, 'conditions civil commitment not upon a mere finding that the sex offender is likely to reoffend, but only upon the additional finding (beyond a reasonable doubt) that the *cause* of the likelihood of recidivism is a 'mental abnormality or personality disorder' [17] Thus, 'the very existence of a mental abnormality or personality disorder *that causes* a likelihood of repeat sexual violence in itself *establishes* the requisite 'difficulty if not impossibility' of control' [18]

Justice Scalia's approach has the advantage of simplicity, since juries would have the comparably simple task of determining whether the defendant's violent propensity was a function of mental abnormality or personality disorder. While simpler, it is hardly any clearer. The confusion lies in the term 'mental abnormality,' which has little substantive meaning beyond what a particular legislature says it means. Justice Scalia made no effort to explain the concept of mental abnormality. If he had, he would have realized that his approach is hopelessly circular. Justice Scalia expects jurors to determine when the mental abnormality has *caused* lack of control. The Kansas statute, however defines mental abnormality as a loss of 'emotional or volitional capacity' Thus, mental abnormality *means* lack of control. Contrary to Scalia's understanding, mental abnormality does not *cause* lack of control, it is defined by it. Under the statute, everyone who is mentally abnormal lacks control and everyone who lacks control is mentally abnormal. Justice Scalia's test is no test at all.

Unfortunately, the *Crane* majority also offered little real assistance in establishing the meaning of 'inability to control' [19] Beyond stating that 'there must be proof of serious difficulty in controlling behavior', the Court added this:

> [W]hen viewed in light of such features of the case as the nature of the psychiatric diagnosis, and the severity of the mental abnormality itself, [the proof] must be sufficient to distinguish the dangerous sexual offender whose serious mental illness, abnormality, or disorder subjects him to civil commitment from the dangerous but typical recidivist convicted in an ordinary criminal case.[20]

The majority's formulation initially does not appear to get us much further than Justice Scalia's circular gymnastics. But embedded in the above statement is an empirical

> you find, beyond a reasonable doubt, that he is appreciably—or moderately, or substantially, or almost totally—unable to control his penchant for sexual violence')? None of these seems to me satisfactory.

Id. (emphasis in original).

[17] *Id.* at 874.

[18] *Id.*

[19] In *Thomas v. State*, 74 S.W.3d 789, 791 (Mo. 2002), the Missouri Supreme Court reversed the defendant's commitment because of an inadequate jury instruction on the issue of volitional control. The court held that 'to be constitutional under *Crane*, the instruction must require that the "degree" to which the person cannot control his behavior is "serious difficulty" ' The court articulated the proper jury instruction as follows:

> As used in this instruction, 'mental abnormality' means a congenital or acquired condition affecting the emotional or volitional capacity that predisposes the person to commit sexually violent offenses in a degree *that cause the individual serious difficulty in controlling his behavior.*

Id. at 792 (emphasis in original).

[20] *Id.* at 870.

proposition that lays bare the whole free will edifice. Specifically, it anticipates that psychologists and psychiatrists can distinguish between mentally *abnormal* and dangerous sex offenders and mentally *normal* and dangerous sex offenders. This is an empirical matter. It posits the hypothesis that there is a set of people who commit violent sex offences that clinicians would *not* deem 'mentally abnormal' Since mental abnormality is defined behaviourally—that is, by definition, if you commit violent sex offences you are mentally abnormal—this set may not exist at all. If this is true, then contrary to the *Crane* Court's hoped-for standard, its approach will not 'be sufficient to distinguish the dangerous sexual offender whose serious mental illness, abnormality, or disorder subjects him to civil commitment from the dangerous but typical recidivist convicted in an ordinary criminal case' [21] The typical recidivist criminally convicted of violent sexual offenses is, for all intents and purposes, always going to be labeled a 'dangerous sexual offender whose serious [abnormality] subjects him to civil commitment' The population subject to civil commitment and the criminal population are thus the same population.

Ultimately, the problem lies in the Court's use of the abstraction 'inability to control behavior' This notion comes from the law's assumption that people have free will. The criminal law is based largely on a theory of deterrence. Only if people have free will, in the Court's view, is the theory coherent. Indeed, this was the very basis for the Court's conclusion in *Hendricks* that the Kansas scheme did not violate the Double Jeopardy or Ex Post Facto Clauses. If the scheme had been found to be punitive, it would have violated these clauses. But the Court found that the Kansas Act was not designed to effectuate the twin goals of the criminal law, retribution and deterrence, and was thus civil in nature. In regard to deterrence,[22] the Court relied on the sexual offender's lack of volitional control:

> Those persons committed under the Act are, by definition, suffering from a 'mental abnormality' or 'personality disorder' that prevents them from exercising adequate control over their behavior. Such persons are therefore unlikely to be deterred by the threat of confinement.[23]

Consequently, the theory goes, criminal sanctions can only be effective on those who can make conscious choices whether to avoid punishment.[24]

The sciences of psychology and psychiatry, in contrast, assume that behaviour is determined by some combination of nature and nurture. The concept of free will has no real meaning in science. There is no 'ghost in the machine'. Scientists are materialists, and thus believe that human decisions are a product of the brain and its interaction with the world

[21] *Id.* at 870.

[22] The Court found that the Act was not retributive, since it 'did not affix culpability for prior criminal conduct'. *Hendricks*, 521 U.S. at 362.

[23] *Id.*

[24] The Court's view of free will is itself somewhat anachronistic. It is not obvious why someone must have free will to be deterred by threat of punishment. Certainly animals learn to avoid punishment and can be deterred from certain behaviours. Is it correct to say that such an animal has free will? Indeed, it may be more accurate to use the term deterrable rather than free will. Thus, instead of saying a sexual offender must lack free will, it would be more useful to say he must demonstrate a lack of deterrability before he can be civilly committed. This would at least offer the benefit of conforming the law's approach to human behaviour to the scientific disciplines that the law relies upon. Unfortunately, it is not clear that scientists have any measures of deterrability that are better than what they offer on 'free will'.

that surrounds it.[25] The science of the mind simply has not advanced far enough to permit experts to know with any confidence what decisions were 'controllable' and which ones were not. The *Crane* Court itself recognized the inherent difficulty of speaking in terms of lack of volitional control. It quoted a well regarded handbook as follows: 'The line between an irresistible impulse and an impulse not resisted is probably no sharper than that between twilight and dusk' [26] The Court's emphatic insistence on retaining 'inability to control' as a factor, despite its lack of meaning, is both puzzling and disconcerting and almost certainly doomed to failure.

I do not mean to suggest that the concept of free will has no place in the legal lexicon, or should be generally abandoned by lawmakers. But it has no factual referent. On the criminal side of the docket, the abstraction of free will has moral significance. Someone with rational control over their actions is considered to be responsible for those actions. Without question, just as is true in the sexual offender context, the idea of free will in criminal cases cannot be operationally defined or made concrete for purposes of scientific investigation. But it is not really intended as a factual issue in criminal cases. The law bestows considerable latitude on criminal juries to make certain moral judgments. In cases involving Post-Traumatic Stress Disorder or the Battered Woman Syndrome, for instance, in which the defendants have killed, their 'responsibility' for their conduct is inevitably part of the jury's deliberations. In civil commitment cases, the moral judgment should be absent, since the defendant is on trial for something he might do, not for something he has done. In fact, given the strong moral component embedded in the notion of free will, using it in civil commitment cases potentially invites jurors to 'punish' the offender for past acts, something specifically prohibited by the Constitution.

B. 'Dangerousness'

As the *Crane* Court's struggle with the concept of volitional control well illustrates, this criterion is unlikely to remain consequential for very long. To some extent, the standard appears to have already collapsed into the unitary criterion of dangerousness. This may not be an unfortunate circumstance, since it at leaves a criterion whose meaning can be objectively and operationally defined. But if dangerousness alone is to be the standard for determining whether someone is civilly committed, it should be defined with a good deal of specificity. Unfortunately, the Supreme Court has yet to clarify what level of dangerousness is sufficient to meet civil commitment standards under sexually violent predator statutes. In *Hendricks*, the Court ignored the issue completely, never once recognizing or addressing the inevitable error rates associated with predictions of violence. And although many state courts have addressed this question, their analyses and conclusions bear an uncomfortable resemblance to the Court's labors in *Crane* with the concept of volitional control.

Courts are increasingly being called upon to clarify the actual standards of proof that apply under laws regulating sexual predators. This was well illustrated in *Crane*, in which the definition of mental abnormality was in question. Mental abnormality—or the lack of volitional or emotional control—is one of the two principal criteria set forth by most

[25] This materialism, of course, includes the body's other organ systems. *See generally* ANTONIO R. DAMASIO, DESCARTES' ERROR: EMOTION, REASON AND THE HUMAN BRAIN (1995).

[26] *Id.* at 870 (*quoting* G. MELTON, J. PETRILA, N. POYTHRESS, & C. SLOBOGIN, PSYCHOLOGICAL EVALUATION FOR THE COURTS 200 (2d ed. 1997)).

state sexually violent predator acts and considered constitutionally necessary in *Hendricks*. The other factor is 'dangerousness'. As noted, the Supreme Court gave no attention to the meaning of this criterion in *Hendricks*. If state court decisions are any indication, the Court is likely to have to revisit this subject soon to say what 'dangerousness' means in practice.

In *People v. Ghilotti*,[27] the California Supreme Court devoted considerable attention to the question of how probable it must be that the defendant will be violent in the future before he can be committed under the State's Sexually Violent Predator Act. Patrick Henry Ghilotti was committed in 1998 after serving two prison terms for multiple violent sex offences. Toward the end of his second two-year commitment, the Director of the California Department of Mental Health appointed two outside evaluators, as directed by state law, to determine whether, 'as the result of a diagnosed mental disorder, [Ghilotti] is likely to commit new acts of criminal sexual violence unless confined and treated'.[28] Both evaluators concluded that Ghilotti no longer met the statutory criteria for commitment. The Director, however, disagreed with these outside evaluators' assessments, and asserted that hospital psychiatrists responsible for treating Ghilotti also disagreed. The State filed a petition seeking Ghilotti's recommitment, arguing that the two independent evaluators had applied the wrong legal standard. The matter quickly came before the California Supreme Court on expedited review. The principal issue before the court was what the word 'likely' meant under the statute.

The California sexual predator statute provides for the civil commitment of a person who 'has a diagnosed mental disorder so that he or she is *likely* to engage in acts of sexual violence without appropriate treatment and custody' [29] The State argued that 'likely' does not mean 'probable' or 'more likely than not'. The State urged that likely meant 'a significant chance, not minimal; something less than 'more likely than not' and more than merely 'possible' ' [30] Ghilotti, in contrast, argued that 'likely' meant 'highly likely,' or at least 'more likely than not' [31] The California Court essentially adopted the State's lower standard, finding that ' 'likely to engage in acts of sexual violence' does not mean the risk of reoffence must be higher than 50 percent' [32] The court set forth its interpretation of the statute as follows:

> [T]he phrase requires a determination that, as the result of a current mental disorder which predisposes the person to commit violent sex offenses, he or she presents a substantial danger—that is, a serious and well-founded risk of reoffending in this way if free.[33]

The court, additionally, held that the 'substantial danger' test did not violate substantive due process.[34] Other states, the court recognized, had opted for a more demanding

[27] 44 P.3d 949 (CA 2002).

[28] 27 Cal.4th at 893 (*citing* The Sexually Violent Predators Act (Welf. & Inst. Code, §6601).

[29] *Id.* at 915.

[30] *Id.* at 916.

[31] *Id.* at 915–16.

[32] *Id.* at 916.

[33] *Id.* Oddly, the court sought support for its definition of the word 'likely' from thesauruses rather than dictionaries. As Justice Werdegar pointed out in dissent, '[o]ne should look to a dictionary, rather than a thesaurus, for a definitive statement of a word's meaning'. *Id.* at 931n.3 (Werdegar, J., dissenting). She found that such a search supported a 'more likely than not' meaning for the word 'likely'. *Id.*

[34] *Id.* at 923.

likelihood standard, but it did not believe the higher standard was constitutionally required.[35] In its view, the court asserted, 'the state has a compelling protective interest in the confinement and treatment of persons who have already been convicted of violent sex offenses, and who, as the result of current mental disorders that make it difficult or impossible to control their violent sexual impulses, represent a substantial danger of committing similar new crimes, even if that risk cannot be assessed at greater than 50 percent'.[36]

Under California law, therefore, the *kind* of proof required is the substantial danger test. However, the *burden* of proof is the beyond a reasonable doubt standard. Over Justice Werdegar's forceful objections, the court found no incongruity in asking juries to determine whether the defendant, beyond a reasonable doubt, 'presents a serious and well-founded risk of committing new acts of criminal sexual violence' [37] Justice Werdegar argued, however, that employment of such a low standard of likelihood of violence would nullify the otherwise demanding beyond a reasonable doubt burden of proof:

> The law ... manifests a clear intent that the state exercise maximum caution before depriving persons of their liberty on the basis of potential *future* crimes. While it may be theoretically possible to ask a jury whether, beyond a reasonable doubt, there is a 'substantial danger' of reoffense, the use of such a low-risk threshold threatens to vitiate the effect of the high evidentiary standard and unanimity requirement. Because the low 'substantial danger' standard will virtually always be met, the requirement of proof beyond a reasonable doubt fades radically in significance. If the person has committed prior violent sex crimes and continues to suffer from a mental disorder predisposing him or her to further sex crimes, a 'substantial danger' is proven beyond *any* doubt.[38]

[35] *Id.* at 923n.14. Examples of contrary authority include, In re Leon G., 26 P.3d 481, 488-89 (Ariz. 2001) ('likely' means 'highly probable'); Commonwealth v. Reese, 2001 WL 359954 *15 (Mass.Super.Ct. April 5, 2001) ('Likely' means 'at least more likely than not'); Matter of Linehan, 557 N.W.2d 171, 180 (Minn. 1996) ('likely' means 'highly likely'); In re Commitment of W.Z., 773 A.2d 97, 115–16 (N.J.Super. 2001); State v. Ward, 720 N.E.2d 603, 609 (OhioApp. 1999) ('likely' requires 'a firm belief of conviction that an offender will more likely than not commit another sex offense in the future').

[36] *Ghilotti*, 44 P.3d at 924 (internal citation omitted; emphasis in original). The court's inclusion of the fact of previous conviction in this statement raises double jeopardy concerns, since the only relevance of a previous conviction is its evidentiary value in demonstrating the defendant's propensity for future violence. Insisting on a prior conviction, irrespective of future dangerousness, suggests a punitive purpose for the law.

[37] *Id.* at 924n.15. Under the law, the jury would also have to find beyond a reasonable doubt that the defendant '(1) previously was convicted of qualifying violent sex crimes, [and] (2) has a mental disorder which seriously impairs volitional control of violent sexual impulses'. *Id.*

[38] *Id.* at 932. The California law first requires that the defendant have committed a prior sex offense. The remaining two factors, serious lack of volitional control and substantial danger, are intended to narrow the population affected by the law from the 'typical recidivist convicted in an ordinary criminal case'. However, given the United States Supreme Court's definition of serious lack of volitional control and the California Supreme Court's 'substantial danger' test, it is hard to imagine any person previously convicted of a sex offense not being considered to suffer from a serious lack of volitional control and who does not pose a substantial danger. I suspect that, in fact, only one criterion is doing all of the work in these cases, and that is prior conviction of a sex offense. If so, this raises substantial constitutional concerns. At the very least, this is an empirical question well worth researching.

In *Brooks v. Franklin*,[39] the Washington Supreme Court similarly combined the beyond a reasonable doubt standard with a lower category of proof requirement. Unlike California, however, Washington requires proof indicating that the defendant is more likely than not a danger. The Washington court explained that the fact that must be proved is a statistical probability:

> [W]hen an expert testifies that a person has a likelihood of reoffending, it means that of the persons who suffer from this mental abnormality or personality disorder, more than 50 percent will engage in predatory acts of sexual violence if not confined in a secure facility. Of 100 similarly afflicted offenders, more than 50 would reoffend if not so confined.[40]

However, it is not certain that this approach satisfies *Addington v. Texas*,[41] in which the Court set the constitutional floor at the clear and convincing evidence standard. The *Addington* Court held that the Constitution requires a 'clear and convincing' standard of proof when a state seeks to involuntarily commit a person to a mental hospital for an indefinite period. In so holding, the Court rejected the more lenient 'preponderance' standard as well as the stricter standard applied in criminal cases of proof 'beyond a reasonable doubt'. The Court explained that the function of a standard of proof 'is to instruct the fact finder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication' [42] The choice in *Addington* was simply put and expressed in classical legal terms, and involved merely the issue of which one of three traditional burdens of proof was appropriate given the procedural context involved. The *Addington* Court, therefore, did not approach the matter as the Washington and California courts have, in which the fact to be proved is a probability estimate and the jury's confidence in that fact must be by some heightened burden of proof. The Court also did not reach this issue in either *Hendricks* or *Crane*. The Court will undoubtedly have the opportunity to consider this matter soon.

In *Brooks*, Justice Sanders wrote separately arguing that Washington's beyond a reasonable doubt—more likely than not—standard violated *Addington's* requirement of clear and convincing proof of dangerousness. He argued that under *Addington*, 'the proof so required is to establish a fact, not a probability' [43] But, contrary to Justice Sanders' view, the probability of future violence *is* 'a fact,' albeit not one known with 100 percent certainty. It is not at all unusual to describe future events probabilistically. The statement that 'there is a 60 percent chance of rain today' is a factual statement. Indeed, it is not incongruous to say that we have 95 percent confidence in the factual statement that the chance of rain is 60 percent.[44]

Although it is not incongruous to ask a jury to find that a defendant is more likely than not dangerous by proof beyond a reasonable doubt, the minimum acceptable likelihood

[39] 36 P.3d 1034 (Wash. 2001).

[40] *Id.* at 1046.

[41] 441 U.S. 418 (1979).

[42] *Id.* at 423.

[43] *Brooks*, 36 P.3d at 1048 (Sanders, J., concurring and dissenting).

[44] Even past statements have an inherent probabilistic quality, though it very often remains implicit. When an eyewitness states that the perpetrator was blonde, we intuitively discount that statement by some chance of error. Virtually all scientific evidence similarly should be viewed as a probability statement of fact.

statement is a policy choice that should be explicitly considered.[45] Thus, in Washington, if all persons fitting a category in which only 51 out of 100 will reoffend are incarcerated, that means as many as 49 out of 100 persons who would not have offended again will be deprived of their liberty. California's 'substantial danger' test will have an even higher percentage of false positives. This false positive rate may or may not be justified as a matter of constitutional principle. If it is, the courts have yet to explain, beyond a few conclusory assertions, why it is. Given the importance of this issue, for defendants in these cases as well as society at large, it is incumbent on the courts to do a better job of explaining the outcomes in these cases.

3. Conclusion

The Supreme Court has held that at least two criteria must be met before a sexual offender can be civilly committed. He must be found to be mentally ill, abnormal or disabled and he must be dangerous. The first criterion is legislatively defined but must include 'proof of serious difficulty in controlling behavior' The second criterion has yet to be defined by the Court with any statistical precision, but presumably requires some substantial likelihood of future violence. State Courts, however, have disagreed on the answer to the question of just how *substantial* this likelihood must be under the Constitution.

As this essay argues, the first criterion does not allow courts 'to distinguish the dangerous sexual offender whose serious mental illness, abnormality, or disorder subjects him to civil commitment from the dangerous but typical recidivist convicted in an ordinary criminal case' In effect, the volitional control core of the mental abnormality criterion invites fact finders to consider moral blameworthiness for conduct that has not yet occurred. This is so because there is no empirical/scientific basis for determining when an act was (or, much less, will be) a product of 'free will'. Free will is a normative construct that has no corresponding operational definition that can be tested. The volitional control prong of civil commitment law thus should not be used, because it invites fact finders to make moral judgments that are inappropriate in the context of predicting future violence.

This, then, would leave only 'likelihood of future violence' as the criterion by which civil commitments could be made. If defined with specificity and if the likelihood is set at a sufficiently stringent level, so as to avoid casting too wide a net, then this prong might be sufficient by itself. Unfortunately, the Court has yet to define this factor in any detail and state courts have mainly chosen likelihood rates that permit virtually any past offender to be caught in their net. While this is a population that hardly engenders considerable sympathy, liberty should not be so readily deprived, even for the most despised among us.

[45] *See* John Monahan & David B. Wexler, *A Definite Maybe: Proof and Probability in Civil Commitment*, 2 LAW & HUM. BEHAV. 37, 38 (1978) ('The probability of violent behavior ... sufficiently great to justify preventive intervention [is] a social policy tradeoff to be decided in the political process'.); Stephen J. Morse, *Crazy Behavior, Morals, and Science: An Analysis of Mental Health Law*, 51 S. CAL. L. REV. 527, 591-92 (1978) ('[W]hether a given probability warrants legal intervention is a social, moral, and legal question'.).